IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.6438 OF 2006

M/s.M.K.Palia & Sons Pvt.Ltd.)
Company registered under the)
Indian Companies Act 1956 and)
having its registered office at)
Plot No.12 & 13, Sewri Bunder Road,)
Opp.Sewri Railway Station (East),)
Mumbai - 400 015.).. Petitioner

Versus

The Board of Trustees of the)
Port of Mumbai, at statutory body)
constituted under the Major Port)
Trusts Act, 1963 as a body)
corporate having their)
administrative office at)
Vijay Deep, Shoorji Vallabhdas)
Marg, Fort, Mumbai 400 038.).. Respondent

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S/Shri V.P.Sawant with P.M.Jadhav for the petitioner.

S/Shri U.J.Makhija with N.M.Munjee i/b M/s.Mulla & Mulla & Craigie Blunt and Caroe for the respondent.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 7th October, 2006

ORAL JUDGMENT:

1. Heard. Rule. By consent, the rule is made returnable forthwith.

2. The petitioner challenges the judgment and order dated 31st July, 2006 passed by the appellate

bench of the Small Cause Court at Mumbai in Appeal No.343 of 2005 as well as the order dated 3rd May, 2005 passed by the learned Judge of the Small Cause Court, Mumbai, in Misc.Notice No.38 of 2005 in L.E.&C. Suit No.612/639 of 1986. By the impugned order passed by the Trial Judge, the application filed by the petitioner under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside the ex parte decree was dismissed and the said order has been confirmed by the appellate bench of the Small Cause Court, Mumbai, in the Appeal No.343 of 2005.

3. Undisputed facts in the case in hand are that the respondent filed the suit for eviction of the petitioner from the suit premises after service of the notice dated 15th January, 1985. The summons in the said suit was sought to be served by substituted service on 24th June, 1988, and thereafter the suit was decreed ex parte against the petitioner on 15th February, 1993. The respondent took out execution proceedings and sought to execute the ex parte decree on 1st February, 2005. The petitioner by application dated 3rd February, 2005 sought inspection of the records before the Trial Court and inspected those records on 8th February, 2005. Thereafter, on 21st February, 2005 the application for setting aside the

ex parte order was filed under Order IX Rule 13 of the Code of Civil Procedure. The Trial Court dismissed the said application holding that the petitioner was duly served by the substituted service on 24th June, 1988 and that therefore the ex parte decree was passed on 15th February, 1993. The Trial Court also held that the application was barred by law of limitation and there was no sufficient cause shown by the petitioner for condonation of delay in taking out the application for setting aside the ex parte decree passed on 15th February, 1993. The matter was carried before the appellate bench without any success and the findings of the learned Trial Judge were confirmed by the appellate bench.

4. While filing the application for setting aside the ex parte decree dated 15th February, 1993, the petitioner had raised four specific points. Firstly that no summons was ever served upon the petitioner in the suit, secondly that the petitioner never found any summons having been pasted on the door of the suit premises, thirdly that it is a practice of the petitioner to open the suit premises 3 to 4 times in a month and this practice is known to the respondent, and fourthly that the respondent very well knew the office address of the petitioner to be Palia Building,

189, Nagdevi Street, Mumbai 400 003, and in fact the respondent had served the suit notice on the said address.

5. Perusal of the application filed under Order IX Rule 13 of the Code of Civil Procedure clearly reveals the following averments by the petitioner.

> "The plaintiffs are opening the godown only 3 or 4 times in the month. This fact is very well known to the Plaintiffs and Plaintiffs representatives have been attending the office premises at the above address from time to time. ..... The Plaintiffs very well know that as far as the Defendants are concerned they are carrying on business at Palia Building, 189, Nagdevi Street, Mumbai 400 003. Inpsite of their knowledge it is quite clear that the summons in the above matter has been tried to be served at the suit premises, which is a godown. ..... Here I may point out that at no time the Defendants have found summons having been pasted on the suit premises. ..... It may be noted here that the Plaintiffs had

sent a notice on 15th January 1985 and the same was addressed by the Plaintiffs as under M/s.M.K.Palia & Sons (Pvt.) Ltd., Palia Building, 189, Nagdevi Street, Mumbai 400 003. From this it is quite clear that the Plaintiffs were very well aware of my business address."

6. All the above averments in the application were duly supported by an affidavit affirmed by the petitioner and none of those averments were denied by the respondent. Perusal of the orders passed by the learned Trial Judge as well as by the appellate bench nowhere discloses any reference to any of those averments. As rightly submitted by the learned advocate for the petitioner that if the respondent was fully aware of the fact that the petitioner is carrying on its business from Palia Building, and further that the suit notice was served on 15th January, 1985 at the said address, one fails to understand why no attempt was made to serve the summons upon the petitioner at the said address. Undisputedly, on three occasions, summonses by ordinary procedure of service were sought to be served upon the petitioner i.e. 27th October, 1986, 14th November, 1986 and 15th April, 1988. But on all the

three occasions, attempts were made to serve the suit notice at the suit premises i.e. godown. Once it is not in dispute that it was the practice of the petitioner to open the godown 3 to 4 times in a month and this practice was known to the respondent as well as the fact that the petitioner carried on business at Palia Building, 189, Nagdevi Street, Mumbai 400 003, and even the suit notice was served at Palia address, it was absolutely necessary for the Courts below to deal with the said contention and to ascertain whether there is any justification for not issuing summons on the address of the business of the petitioner. It is not the case of the respondent that the parties had agreed that for the purpose of service of notice or of summons, the petitioner's address shall be at the suit premises. Once there was no such agreement nor there was a plea raised by the respondent to that effect, the Court below ought to have considered the fact that there was no genuine attempt on the part of the respondent to serve the summons upon the petitioner and for the same reason, it ought to have held that on failure on the part of the respondent to serve the summons at the appropriate address of the business of the petitioner, in fact, there was no service of summons upon the petitioner. Indeed, the order allowing the respondent to serve the summons by

substituted service itself was absolutely bad in law. It is apparent that the said order was passed without proper application of mind. Had the Trial Court ascertained as to whether the suit notice was served upon the petitioner on 15th January, 1985 or not before the application for substituted service was allowed, all the further proceedings could have been avoided and the parties would not have put to such inconvenience.

7. Since both the Courts below have failed to exercise their jurisdiction in the manner it was required to be exercised in relation to the aspect of service of summons in the suit and further to deal with the matter under Order IX Rule 13 of the Code of Civil Procedure when the party approached with a specific plea of non service of the summons, and both the Courts below having failed to consider the materials on record in the manner the same were required to be considered to arrive at the correct finding on the aspect of service of the summons upon the petitioner, both the orders passed by the Courts below cannot be sustained and are liable to quashed and set aside.

8. In normal circumstance on setting aside of

such orders, the matter is remanded to the Trial Court to deal with the matter afresh. However, considering the fact that the suit relates to the year of 1986 and it was essentially on account of improper exercise of jurisdiction of the Courts below the matter has been lingering till this date and considering the undisputed facts on record, no purpose would be served by remanding the matter to the Court below to decide the application for setting aside the ex parte decree under Order IX Rule 13 of the Code of Civil Procedure. The facts which are totally undisputed clearly justify allowing the said petition and to set aside the ex parte decree passed by the Trial Court in the matter.

9. In the result, therefore, the petition succeeds. The impugned orders passed by the Trial Court as well as the Lower Appellate Bench are hereby quashed and set aside along with the ex parte decree dated 15th February, 1993 passed in L.E.& C. Suit No.612/639 of 1986 and the said suit is restored to the board at the stage of filing of the written statement by the petitioner and the matter shall stand fixed before the Small Cause Court, Mumbai, on 28th November, 2006 at 11.00 a.m. The rule is made absolute accordingly with no order as to costs.

(R.M.S.KHANDEPARKAR, J)